No. 3126

9

In the United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

JAMES A. MURRAY,

Appellant,

vs.

H. E. RAY, as Trustee of the Estate of Alec Murray, Bankrupt,

Appellee.

APPELLANT'S BRIEF

Appearance for Appellant:

J. BRUCE KREMER,
JAMES E. MURRAY,
Of Butte, Montana.

Appearance for Appellee:

J. M. STEVENS,
Of Pocatello, Idaho.

In the United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

JAMES A. MURRAY,

Appellant,

vs.

H. E. RAY, as Trustee of the Estate of Alec Murray, Bankrupt,

Appellee.

BRIEF OF APPELLANT

STATEMENT OF CASE.

This suit was brought for the purpose of setting aside a certain conveyance made by the bankrupt Alec Murray to James A. Murray, appellant herein, defendant below.

The property in controversy is known as the "Auditorium property," a valuable block in the City of Pocatello, Idaho. The property was acquired by the appellant James A. Murray, some time in 1906 (Trans. page 40-54). The title was originally taken in the name of E. L. Chapman, a bookkeeper and agent of appellant (Trans. page 56-57). It was

afterwards transferred to Monidah Trust, a Delaware corporation, organized and controlled by appellant (Trans. page 54). On June 5, 1912, appellant caused this property to be conveyed to the bankrupt. The bankrupt, Alec Murray, is a nephew of appellant and was at the time of the transaction herein referred to employed by appellant as assistant manager of the Pocatello Water Works System, the property of appellant (Trans. page 54). For a short time an undivided one-half interest in this property stood in the name of George Winter who was likewise employed by appellant in the conduct of the Pocatello Water Works System (Trans. page 41). While the legal title thus stood in the name of the bankrupt, it appears from the evidence that he acquired some extravagant notions, and lived somewhat beyond his means, creating the indebtedness shown by the schedule of liabilities attached to the complaint herein (Trans. pages 14-17). On March 5, 1917, the property was reconveyed to the appellant James A. Murray (Trans. page 41).

It is this reconveyance to appellant that is attacked in this proceeding. It is alleged in the bill of complaint that the property in question was by the bankrupt on the 5th day of March, 1917, conveyed to the appellant herein; that the consideration specified in said transfer was wholly fictitious and that in fact no consideration whatever was paid by defendant for said property and that the transfer was and is fraudulent and void.

Among other allegations in the petition it is also alleged that the First National Bank, one of the creditors of the bankrupt on the day following the reconveyance of this property by the bankrupt to James A. Murray, made a loan to the bankrupt at which time the bankrupt represented that the property in question belonged to him and it is alleged in the complaint that this loan was made upon the faith and credit of such representations. Upon this complaint the court below is asked to direct a reconveyance of the entire property in question to the trustee for the benefit of the general creditors of the bankrupt.

THEORY OF THE CASE.

The theory upon which this proceeding is prosecuted is not quite clear, but it would appear from the main allegations of the complaint that this suit is prosecuted upon the theory that the property in question became and was the absolute property of the bankrupt, and that it was conveyed by the bankrupt to the appellant herein without any valid consideration and with the intent and purpose of defrauding the general creditors of the bankrupt. This was the theory adopted by the court below as will appear from the decision and opinion filed in the case. In the decision the learned judge makes the following findings: "The deed from the Monidah Trust Company to the bankrupt makes a *prima facia* case of absolute ownership in the latter. This is strongly fortified by his declarations and use

of the property while in possession and holding the record title, and further by the defendant's own representations and conduct in the city suit."

The evidence, however, wholly fails to sustain the theory upon which the case was decided. There is no conflict in the evidence, but the trial court failed to give proper effect to the undisputed facts in the case.

THE EVIDENCE.

There is no testimony in the records disputing the contention of the appellant that the property in question was conveyed to Alec Murray in trust with the express understanding and agreement that it was to be reconveyed upon demand. The only testimony on this point was given by the appellant herein and by his attorney who attended to the matters pertaining to the preparation of deeds, etc. The appellant on this point testifies as follows:

> "I am the defendant in this action, James A. Murray. I am acquainted with Alec Murray, the bankrupt in this proceeding. He came to Pocatello some time prior to 1912. About 1910 or 1911. I first became familiar with the Auditorium property some time in 1906 or 1907. I am the President of the Monidah Trust Company. The deed introduced in evidence here shows a conveyance from the Monidah Trust Company to Alec Murray in 1912. I ordered it drawn up and signed it as President of the Trust Company. I organized the Monidah Trust Com-

pany. All but a little stock I placed in other people's hands so they could act as directors. But all the stock is really owned by me.

"Q. At the time you executed this deed from the Monidah Trust Company to Alec Murray, what understanding or agreement did you have with him in connection with any trust?

"A. No particular agreement. *I put it in his name for my own convenience.*

"Q. Was anything said with reference to him holding it merely in trust for you?

"A. That was generally understood, that was all. He deeded an interest in it to George Winter at my request, and Mr. Winter made a return deed at my request.

"Q. At the time you conveyed it to him did you have an understanding that he was to reconvey it to you or to anyone else you might designate?

"A. No, no agreement.

"Q. You had an oral agreement, did you not?

"A. Yes, sir; I didn't think we needed anything more.

"Q. At the time the deed was executed from the Monidah Trust Company, was there any consideration paid by Alex Murray for the deed?

"A. Not a nickel—not so much as a nickel.

"Q. Was there actually a dollar paid?

"A. In form, but he never paid so much as a postage stamp.

"Q. The record here shows a conveyance to you from Alec Murray in March 5, 1917—did you request him to convey that property back?

"A. Yes, sir.

"Q. Was there any consideration paid at that time?

"A. Not a nickel—not so much as a nickel. As a matter of fact, never at any time did I think for a minute he had as much interest in that property as you have right now. * * * I was aware of the fact that Alec Murray deeded part of this property to Mr. Winter. I told him to, and it was reconveyed by my order.

"Q. You say there was no consideration for the deed from Murray to you?

"A. No, sir.

"Q. You knew this property had stood in the name of Alec Murray from about—

"A. For about four or five years, from about the 8th of June, 1912, up until it was redeeded to me. Practically five years. I will say this, that several times I had it on my mind to have it transferred but let it go. I knew it stood in his name for practically five years.

"Q. You knew that Mr. Murray held himself out as the owner of that opera house property?

"A. I did not.

"Q. Wasn't that by your own suggestion on account of that judgment being against you in Pocatello?

"A. So far from my mind as the moon. That judgment didn't give me that much concern. Never dreamed of such a thing.

"Q. The agreement between the Monidah Trust Company and Mr. Murray was not in writing?

"A. No writing between us.

"Q. No writing between you and Mr. Murray?

"A. No, sir.

"Q. You said no distinct agreement but just a general understanding?

"A. Yes, sir.

"Q. You placed the property in his name and allowed it to stand with the understanding that when you wanted it you could get it back?

"A. Yes, sir.

"Q. And during the time did you know that Mr. Murray paid the taxes on the opera house?

"A. He paid it out of the Water Company.

"Q. You know that of your own knowledge?

"A. Mr. Winter paid it out of the water money and when he was manager, he paid it out of the company money.

"Q. You knew that the opera house—I mean the Auditorium property where I have said opera house—was assessed during all these years to Alec Murray?

"A. Yes, it must have been.

"Q. Did you know, Mr. Murray, that Alec Murray carried several separate accounts in the Citizens Bank?

"A. I did not.

"Q. One account for the Water Company, a personal account for the Auditorium?

"A. I did not.

"Q. And did you know, Mr. Murray that Mr. Alec Murray paid the taxes upon this property out of his own personal fund?

"A. No, sir. I sent him the taxes for the last two years. I have forgotten how much, but I sent it. The other time these came out of

the Water Company. He had no money of his own, buying automobiles and one thing another.

"RE-EXAMINATION BY M. JAMES E. MURRAY:

"Q. Mr. Murray, is it unusual for you to carry property situated in different parts of the country in the name of other parties?

"A. I believe I have some in your name now which I expect to have deeded back pretty soon. I am going to have those matters straightened up.

"Q. You have also had property in Mr. King's name?

"A. Yes, sir.

"Q. Also in other cities beside Butte?

"A. Oh, I have done that right along, down down in California in San Diego, but after this suit I will straighten up things."

(Transcript, pages 54-60.)

James E. Murray, called as a witness on behalf of appellant, gave testimony on this point. He testified in substance:

That the conveyance of the property in the first instance to the bankrupt, Alec Murray, was made with the express understanding and agreement between the parties to the transaction that it was to be held in trust, and was to be reconveyed to appellant upon demand; that at the time of the conveyance to Alec Murray, he was acting as appellant's attorney, and as such had charge of the transaction,

prepared the papers and talked to Alec Murray about it on different occasions, and at the time of the reconveyance by the bankrupt to the appellant, the witness wrote to bankrupt requesting the reconveyance.

(Transcript, pages 61-65).

No testimony was offered on behalf of complainant to rebut this proof. During the course of the trial, however, counsel for complainant made the following statement:

> "MR. STEVENS: In connection with the testimony of James A. Murray, I desire to call the court's attention to the suit of the City of Pocatello vs. James A. Murray, and especially that part of the opinion of the court found upon page 453 touching the affidavits of Alec Murray and James A. Murray, and at the bottom of page 464, relative to the ownership of the Auditorium Theatre in Pocatello.
>
> (Transcript, page 65.)

> "It appears from the opinion of the court in the litigation referred to, that a controversy was going on between James A. Murray, the owner of the Pocatello Water Works system, and the City of Pocatello, and among other things, proceedings were intsituted by the City of Pocatello to compel Mr. Murray to appoint commissioners to represent him as owner of the Water Company in the matter of establishing rates; that to be qualified as a commissioner, a person must be a taxpayer; that Mr. Murray appointed George Winter and Alec Murray, the bankrupt, herein,

> as commissioners to represent him in this proceeding relating to the establishment of rates; that in this proceeding, the bankrupt and said George Winter testified that they were the owners of the property in question; that they were taxpayers and qualified to act as commissioners. No other testimony was offered by complainant relating to this matter."

It will be observed that the record contains considerable testimony offered by complainant with a view of establishing an *estoppel* in favor of the First National Bank of Pocatello in support of the allegation contained in the complaint by which it was alleged that the First National Bank loaned the bankrupt certain money upon the strength of his declared ownership of the property in question. Upon the submission of the case in the court below, however, this theory seems to have been abandoned, and it was sought to establish, as heretofore stated, that the conveyance by James A. Murray to the bankrupt was an absolute and unqualified conveyance and constituted a gift; that the property became and was the absolute property of the bankrupt, and constitutes a part of the bankrupt's estate, and, as will be observed from the opinion and decision of the court, it was so found in the court below.

SPECIFICATION OF ERRORS.

Comes now the defendant, James A. Murray, and files the following assignment of errors, in support of his appeal from the decision and decree made and entered herein by this Honorable Court on the 5th day of January, A. D. 1918, and respectfully shows that said decision and decree is erroneous and unjust to defendant, for the following reasons, to-wit:

I.

That the court erred in finding and deciding that the conveyance of the property involved in this suit by the defendant James A. Murray to the bankrupt Alec Murray, was an absolute conveyance in fee simple without any restrictions, conditions or qualifications and that no trust was ever made or created, obligating the bankrupt to reconvey said property to the defendant.

II.

The court erred in finding and deciding that the conveyance from the bankrupt, Alec Murray, to the defendant, James A. Murray, was voluntary and in law a mere gift.

III.

That the court erred in finding, deciding and decreeing that the conveyance of the property involved in this suit by the defendant James A. Murray through the Monidah Trust, a corporation, controlled by defendant, was an absolute conveyance of the title to the property involved in this suit in fee simple and

that there was no trust agreement or obligation made or created by the parties obligating the said bankrupt Alec Murray, to reconvey said property to the defendant herein.

IV.

That the court erred in finding and deciding that no competent or sufficient proof was offered or introduced in evidence to establish a trust or other agreement or obligation on the part of the bankrupt to reconvey the property involved in this suit to the defendant, James A. Murray.

V.

This court erred in not finding, deciding and decreeing that the defendant herein, James A. Murray, was the owner of the equitable estate or title in the property involved in this suit.

VI.

The court erred in not finding, deciding and decreeing that the legal title to the property involved in this suit was conveyed to and held by the bankrupt, Alec Murray, in trust for the defendant herein.

VII.

That the court erred in not finding, deciding and decreeing that the defendant James A. Murray, was entitled to a reconveyance of the property involved in this suit and that the reconveyance of said property by the bankrupt was made in compliance with and in performance of said trust and is valid as against the creditors of the bankrupt.

VIII.

That the court erred in ordering and entering a decree herein in favor of the plaintiff and against the defendant for the reason that the testimony conclusively establishes the fact that the property involved in this suit was held in trust by the bankrupt, Alec Murray, for the benefit of the defendant herein and that defendant was entitled to a reconveyance of the same.

IX.

That the court erred in ordering and entering the decree herein in favor of the plaintiff and against the defendant for the reason that the relief granted by said decree was not warranted by the pleadings and was not within the issues framed by the pleadings.

X.

The court erred in not finding and rendering its decision herein in favor of the defendant and against the plaintiff and in failing to decree the defendant herein to be the equitable owner of the property involved in this suit for the reason that the uncontradicted testimony establishes the fact that the defendant was at all times the owner of the equitable title or estate in said property and that he caused the legal title to be conveyed to the bankrupt Alec Murray, without any consideration and upon the express agreement and understanding that the said bankrupt was to hold the legal title to said property in trust for defendant herein.

ARGUMENT AND AUTHORITIES.

It will appear from the foregoing statement of the case that the property in question should be held for the benefit of the creditors who extended credit to the bankrupt, relying on his apparent ownership, was abandoned, and the decision of the court is based upon the proposition that the conveyance of the property by the appellant to the bankrupt was an absolute and unqualified conveyance and constituted an unconditional gift; that the property rightfully belongs to the bankrupt's estate and its reconveyance by the bankrupt to the appellant herein was made without consideration and for the sole purpose of defeating the rights of the creditors of the bankrupt.

If that is the correct theory upon which this suit is prosecuted, it is incumbent upon the plaintiff to establish the actual ownership of the property in the bankrupt and that the conveyance to James A. Murray was made without consideration. These facts being established the conveyance would, of course, be fraudulent against the creditors and the court would be justified in accordance with the prayer of the complaint in setting aside and declaring void the transfer and requiring a reconveyance of the property to the trustee in bankruptcy. If this is the theory upon which the case is to be considered, it is obvious in view of the conceded facts in the case that the court erred in rendering its decree in favor of the plaintiff. The testimony wholly fails to estab-

lish the material allegations of the complaint. On the contrary it does affirmatively establish the fact that the appellant was at all times the equitable owner of the property in question and that the bankrupt held the bare legal title in trust for appellant. In recognition of this trust the bankrupt reconveyed the property to appellant by deed dated March 5, 1917, a copy of which is attached to the complaint herein (see Trans. pages 17-18).

The testimony concerning the circumstances under which the title to this property was placed in the name of the bankrupt and the circumstances under which the title to this property was placed in the name of the bankrupt and the circumstances attending the reconveyance of the same is set forth quite fully in the statement of the case and there is a complete absence of any showing of fraud in connection with these transactions. It is apparent from the undisputed testimony in the record that no consideration was necessary to support the reconveyance by the bankrupt to the rightful owner. In so conveying the property to the rightful owner the bankrupt was merely carrying out the terms of the parol trust. He held the bare legal title to the property and had no beneficial interest in it whatever, therefore the reconveyance by him to the equitable owner is not fraudulent.

As said in the case of Martin vs. Thomas:

> "If the debtor holds the bare legal title to the property for another and has no beneficial

> interest therein, it cannot, in the absence of elements of estoppel be reached and subjected to the payment of his debts, and therefore a conveyance thereof by him to the equitable owner or a third person at the request of the equitable owner, is not fraudulent as against his creditors. * * * It follows that where one who holds real or personal property under a parol trust makes a declaration of trust in accordance with the parol agreement or conveys the property in accordance therewith, his creditors, in the absence of elements of estoppel cannot attack the declaration or conveyance as fraudulent and subject the property to the satisfaction of their claims."
>
> Martin vs. Thomas, et al., 144 Pac. 684.

In the case of Silvers vs. Potter, the Supreme Court of New Jersey considering a situation similar to the case at bar, said:

> "The important question is in regard to the character of the interest which Lewis had in this property. The deed from his mother to himself is, on its face, an absolute conveyance of the property with covenants of warranty.
>
> "It is claimed that parol evidence is not admissible to establish the fact that this was a conveyance of this property, by the mother to the son, to be held in trust by him for her and his brothers and sisters.
>
> "If the effort on the part of the defendants at this time, was to establish such a trust, then the contention of the complaint would be well

founded; neither the mother, nor any one claiming under her, could under the statute of frauds, in the face of this absolute conveyance, establish, by parol testimony, that it was only a conveyance of the property to Lewis in trust. Nor could Lewis, under the statute of frauds make an effective parol declaration of trust of the lands conveyed to him by such a deed. But it was entirely competent for Lewis, so long as he held the title to the property, to have made a bona fide declaration of trust in writing, and, if so made, the same would have been valid against his heirs and creditors.

"If he had not made this deed, but had bona fide executed a proper declaration of trust, it would have been good against these creditors, even if made after their attachments had been levied. Gardner v. Rowe, 2 Sim. & S. 346; S. C. on appeal, 5 Russ. 258. A lease was granted to W., who afterwards committed an act of bankruptcy and then executed a deed stating that his name had been used in the lease in trust for R., and declaring the trust accordingly. A bill was filed on behalf of the creditors of W., under the commission in bankruptcy, claiming the lease as part of his estate, and the court directed an issue to try whether W's. name was used in the lease as a trustee for R. The jury having found a verdict in the affirmative, it was held that the declaration of trust was valid, though executed after bankruptcy, and that the lease did not pass to W's. assignee. The question in such a case, is, of course, whether the estate was in fact conveyed in trust.

"The statute of frauds covering this point is a rule of evidence. It provides that the trust must be manifested or proved by a sufficient writing, but a trust can still be created by parol. It cannot be enforced in a court while it rests in parol alone, because the statute intervenes and says that it must be manifested or proved by writing. There is, however, nothing which requires that the writing should be executed at the time that the trust is created—in fact, it may continue to rest in parol and not be declared until the trustee dies, and then may be so declared by his will."

Silvers vs. Potter, 48 N. J. Eq., page 539.

The property of a third person held in trust by the bankrupt is no part of the bankrupt's estate. In order to avoid a transfer under the provisions of the bankruptcy act it is necessary to show that the transfer was made with the intent and purpose on the part of the bankrupt to hinder, delay or defraud creditors. A transfer of real property held in trust to the rightful owner is not fraudulent.

Lockren v. Rustan, et al., 81 N. W. 60;
Phillip vs. Kleisman, 27 Am. Bankruptcy Rep. 195;
Sillman vs. Todd, 27 Am. Bankruptcy Re. 127;
Brandeburg on Bankruptcy, Sec. 797;
Young vs. Allen, 207 Fed. 318.

If the property is transferred before any creditors fasten any lien on it, it does not constitute any part

of the bankrupt's estate. In order to hold it as a part of the bankrupt's estate the creditors must have asserted a claim upon it before the title was transferred to the rightful owner.

Young vs. Allen, 30 Am. Bankruptcy Rep. 261;
York vs. Castle, 201 U. S. 344;
26 Sup. Ct. Rep. 481;
Lockren vs. Rustan, et al., 81 N. W. 60.

The trustee in bankruptcy takes the property of the bankrupt in cases unaffected by fraud in the same plight and condition that the bankrupt himself held it and subject to all the equities impressed upon it in the hands of the bankrupt.

In the case of Cottrell vs. Smith, et al., the Supreme Court of Iowa discussing the subject said:

> "We proceed to consider whether the conveyances were fraudulent, and, if not, whether there is any other ground upon which the plaintiff's claim can be sustained. There is no pretense that any consideration moved to the grantor. If the conveyances can be sustained, they must be sustained upon the ground upon which the grantor put them in her testimony, and that is that the land rightfully belonged to the heirs and not to her. She did not probably mean that they had a legal or equitable right to the land in the sense that they had a right which they could enforce, but that they had a moral right. That they had such right it appears to us cannot be denied. Now where an act is done in the dis-

charge of a moral obligation it cannot be deemed fraudulent. No person is bound to hold for his creditors what in good morals does not belong to him but to another. The legal title, then of the grantees supported as it is by a moral right, must be held to be good."

Cottrell vs. Smith, et al., 18 N. W. 865.

If there had been no bankruptcy proceedings against Alec Murray the property involved in this proceeding would have been recognized as trust property as between the bankrupt and James A. Murray the real owner. There was no fraud or intention to do anything immoral or injurious to any one. Under the arrangement the bankrupt was to hold the property temporarily with the understanding that it was to be re-transferred upon request. The transaction then is wholly unattended by fraud or any indication of fraud. It was the plain duty of Alec Murray to re-transfer the property as he did and it does not constitute a fraudulent transfer and comes under none of the provisions of the bankruptcy act rendering the conveyance void as against the trustee.

But the court below says that appellant had an object in view in placing the title of the property in question in the bankrupt; that he desired to qualify the bankrupt and one George Winter as commissioners in certain water rate proceedings pending in the state court and that to qualify as such commissioners these persons were required to be taxpayers of the municipality and that to permit the appellant to now

assert that the title was vested in the bankrupt conditionally would constitute a fraud.

We submit that this contention cannot be sustained. If the title still remained in the bankrupt it is no doubt true that appellant would not be permitted to establish the trust by parol. But here the trust has been terminated by a reconveyance executed by the trustee before the institution of the bankruptcy proceedings. There is no proof that the facts were otherwise than as testified to by the witnesses for defendant. The testimony of defendant is consistent throughout. Long before the controversy in this case arose defendant had permitted the title to the same property to stand for a while in the name of E. L. Chapman (Trans. pages 40-56), and in fact in numerous instances has done the same thing with other property (Trans. pages 59-60).

There is not the slightest proof of fraud on the part of appellant. If, however, a claim of fraud could be based upon any of the acts of appellant, how can it be contended that the creditors of the bankrupt should receive any advantage by reason of said alleged fraud. Only the person defrauded is entitled to assert a claim of fraud. Here the creditors were in nowise injured by the act of appellant in placing the title of this property in the bankrupt. They were not parties to the transaction, were in nowise connected with it and can claim no rights under it.

Estoppel is available only to parties and privies.

Simpson vs. Pearsons, 99 Am. Dec. 577;
Blanks vs. Klein, 53 Fed. 438;
Deery vs. Cray, 72 U. S. (5 Wall), 795;
18 L. ed. 653;
Branson vs. Wirth, 17 Wallace 32;
21 L. ed. 566;
First National Bank of Lincoln, Nebraska vs. Duncan, 101 Pac. 992;
28 L. R. A. (N. S.) 327-330 and foot notes;
Wilson vs. Phoenix Powder Mfg Co., 52 Am. State Rep. 895.

Estoppel is not available to strangers or third persons.

Jackson vs. Brinkerhoff, 3 Johnson cases (N. Y.), 101.

The general rule is that title to land cannot be extinguished or transferred by acts in *pais* or by oral declarations. The only exception is active fraud.

Kirk vs. Hamilton, 102 U. S. 68-76.

We submit, however, that no fraud was committed by appellant in the transaction in question. To constitute a person a taxpayer, it is not necessary that it be shown that he is the owner of the equitable as well as the legal title.

"In the case of Lasityr v. City of Olympia, 61 Wash. 651, 112 Pac. 752, the Supreme Court of Washington, in defining "taxpayer" when applied

to the qualification of a juror, said: 'We are inclined to agree with the respondent that a taxpayer within the meaning of this statute, is a person owning property in the state, subject to taxation and on which he regularly pays taxes."

"The Court of Appeals of Missouri, in the case of State ex rel. Sutton v. Fasse, 71 S. W. 645, defines 'taxpayer' as 'a person owning property in the state subject to taxation, and on which he regularly pays taxes."

The laws of Idaho make no requirement that the taxpayer must be the owner of a perfect unencumbered title or that he must be the owner of the equitable as well as the legal estate. In the case of Tracey vs. Reed the Circuit Court for the District of Oregon has held that the owner of property for the purpose of taxation is a person having the legal title or estate therein and not one who by contract or otherwise has a mere equity therein or a right to compel a conveyance of such legal title or estate to himself.

Tracey vs. Reed, 38 Fed. 69.

Reconveyance by Bankrupt was not fraudulent as against creditors except such as might have extended credit on the strength of the apparent ownership. Jackson v. Brown 15 Johns. 263. Bank v. Sturgis - 81 S.W. 550.

COMPLAINANT'S PROOF.

As heretofore stated complainant has offered no proof tending in any degree to establish fraud on the part of defendant. During the introduction of defendant's proof, however, counsel for complainant called the attention of the court to the suit in the state court entitled "City of Pocatello vs. James A. Murray" (see Trans. page 65). The files and proceedings in that case were never offered in evidence and defendant was given no opportunity to examine the matters referred to in that case and had no opportunity of offering evidence in explanation or rebuttal.

We submit that the court erred in considering the files and records in that case as proof herein. It was wholly incompetent as evidence in this case.

CAN DEFENDANT'S TITLE BE DIVESTED AND THE PROPERTY HELD FOR CREDITORS UNDER THE DOCTRINE OF ESTOPPEL?

It may be contended, that the petition establishes an equitable right on the part of the First National Bank of Pocatello to hold the property in the hands of the defendant James A. Murray, liable to the extent of the credit which was extended to the bankrupt as the apparent owner of the title and that the petition must therefore be upheld to the extent at least of holding the property for the purpose of col-

lecting the indebtedness of the First National Bank. This equitable right is sought to be enforced under the doctrine of estoppel. This doctrine is announced by some text writers in the following language:

> "Where the true owner of property holds out another, or allows him to appear as the owner of or as having full power of disposition over the property, *and innocent third parties are thus led into dealing with such apparent owner, or person having such apparent power of disposition,* they will be protected."
>
> 16 Cyc. 773-774.

This simply means that in dealing with real property a person is protected from the claims of the real owner if the person purporting to be the owner holds the record title. The true owner is estopped from setting up a title as against one obtaining title through any one in whose name title stands of record. It does not mean, that the true owner may through the doctrine of estoppel be divested of his title by one who has secured no actual title, claim or lien on the property, relying on the apparent ownership. In other words, if the apparent owner while carrying the legal title transfers to a third party some right, title or lien in the property, or if such third party procures a lien on the property so recognized by law, such third party will then be protected in his ownership against the claim of the true owner under the doctrine of estoppel.

In the case before the court, however, the title has been transferred to the true owner and no lien or title has ever been obtained by the First National Bank or any other creditor through the apparent owner. But it is sought by the doctrine of estoppel, merely, to divest the true owner of his actual title for the benefit of the First National Bank, who claims that it extended credit on the strength of the apparent ownership of the bankrupt. This is carrying the doctrine of estoppel to a degree wholly inconsistent with fundamental principles. In order to invoke the doctrine of estoppel complaint must have established some legal title or lien fastened on the property through the holder of the apparent title and this being shown the real owner will then be estopped from setting up his title.

While the property stood in the name of Alec Murray it could undoubtedly have been seized by his creditor, as said by Mr. Wait in his work on fraudulent conveyances: "Until the creditors of the rendee acquire actual liens upon the property they have no legal or equitable claims in respect to it higher than or superior to those of the grantor."

Wait on Fraudulent Conveyances, Sec. 398, Sec. 73;
Davis vs. Graves, 29 Barb. (N. Y.), 285;
Powell vs: Ivy, 88 N. C. 256;
Keal vs. Larson, 83 Ala. 146;
Lillis vs. Gallagher, 39 N. J. Eq. 94.

Under the circumstances here the reconveyance by the bankrupt to James A. Murray is valid between the parties themselves and valid as against the general creditors of the bankrupt, except such of them as may have acquired some lien against the property while in the hands of the apparent owner. As to such a creditor the true owner may be estopped from asserting his ownership when to do so causes an innocent creditor to suffer and such a creditor is allowed to hold the property to the extent of satisfying his lien. It must be conceded under the evidence in this case that the First National Bank never asserted any claim against the property while the same was held by the bankrupt and acquired no judgment or lien against it in the hands of the bankrupt and is therefore under the authorities not in position to hold the property as against the true owner.

In the case of Wilson vs. Harris, the Supreme Court of Montana, said: "Property of a debtor subject to execution in possession of an assignee under a conveyance void to creditors may not be reached through proceedings of equity until such creditors have obtained a specific lien on the property."

Wilson vs. Harris, 21 Mont. 374.

The same court in a later case, said: "In an action to set aside a conveyance of both real and personal property as fraudulent towards creditors, the complaint does not show that plaintiff has a lien on such property. It fails to state a cause of action

for such relief and an objection to the admission of any evidence thereunder should be sustained."

Also see:

Raymond vs. Blancgrass, 36 Mont. 449;
Wheeler & Motti Co. vs. Mood, 141 Pac. 665.

This is also the rule with reference to mortgages void as against creditors. It is only such creditors as have secured liens against the property covered by the void mortgage that are in position to have the property brought into the bankrupt's estate.

In Re New York Co., 110 Fed. 514.

In the case of Marston vs. Dresen, the Supreme Court of Wisconsin has held that where a wife has intrusted her separate property to her husband to invest and manage in his own name and to transfer it to her when she so desired, and not having been transferred to the husband for the purpose of giving him credit and no representations having been made, and the wife not knowing that credit was given on the faith of such apparent title, she is not estopped to claim it as her own.

Marston vs. Dresen, 85 Wis. 530;
55 N. W. 896.

In the case of Dodd et al. vs. Bond, the court held that a reconveyance by the holder of a legal title to the quitable owner for the purpose of protecting it from the claims of creditors is not fraudulent where

the creditor has not acquired a lien upon it prior to the reconveyance. The court in that case saying:

> "One who takes merely what is his own is not punished for considerations which may operate upon the mind of the party who gives it up. In this case the wrongful holder of the property was performing a legal and moral duty; was doing that which in the eyes of the law ought to have been done, in placing the property where it belonged. We hold therefore that the conveyance is good as against these creditors."
>
> Dodd et al. vs. Bond, 14 S. E. 581.

The leading case on the subject now under consideration is the case of Bicocchi vs. Casey-Swasey Co., decided by the Supreme Court of Texas. In that case a very extensive opinion was filed discussing the principles of law applicable here, and the court arrives at the conclusion that the conveyance of property to the rightful owner before the cerditors acquired any lien by judgment or otherwise is valid and good as against creditors. In conclusion the court says:

> "The estoppel applied in this case goes beyond the limits of the rules of law, and the further proposition that one who extends credit to the apparent owner of property, relying upon false statements of ownership, acquires a fixed right in such property would lead to many complications and produce more injustice than that which has aroused the indignation and enlisted the sympathies of judges in the cases cited, leading

them to expressions which are more elegant than accurate. We will give some illustrations of what we regard as probable consequences of that rule. Let us suppose that before Mazza conveyed the Bicocchi, a creditor of the former, who did not know of the existence of the property in question and did not rely upon it in giving credit, had levied an attachment upon it. Such attachment, levied before the conveyance was made, would have held the property as against Bicocchi. If the defendants in error, holding the same debts, contracted upon the same representations by Mazza and under the same belief as to the truth of those representations, had subsequently to the first attachment, but also before the conveyance to Bicocchi, levied a writ of attachment upon the same property, claiming priority over the first attaching creditors, because their debt was contracted upon their faith in the statement of Mazza, and with reference to his ownership of this particular property, could they have maintained their claim of priority over the prior attaching creditors? We think clearly they could not. If both attachments had been levied in the same order after the conveyance was made to Bicocchi, the first attaching creditor's right would be superior to the second attachment, but would be inferior to the right of the grantee; and yet, according to the holding of the court of civil appeals in this case, the second attachment, which could not hold the property as against the first attachment, would be declared to have a right of foreclosure against Bicocchi, whose right would be superior to that of the first attaching creditor.

> These inconsistencies and complications show that the proposition upon which this judgment rests is at variance with the well-settled rules of law by which alone courts may determine upon the rights of citizens."
>
> "Judicially looked at from any standpoint, this case finally resolves itself into the question first stated: Was Mazza under moral obligation to convey to Bicocchi the property in accordance with his agreement, and did that moral obligation constitute such a consideration as would in law be sufficient to sustain a deed of conveyance when made in pursuance of such agreement? Having reached an affirmative answer to that question, the case must be determined in favor of the validity of the conveyance made by Mazza to the plaintiff in error."
>
> Bicocchi vs. Casey-Swasey Co., 42 S. W. 963, 66 Am. St. Rep. 875.

In In Re McConnell, it was held that where a bankrupt and another purchased property jointly taking the deed in their joint names, but the money being advanced by the other under a parol agreement to sell the property and divide the profits after reimbursing the other for the purcahse price, the creditors had no claim superior to the equitable owner of the property; that the creditors had no lien or claim superior to the other party growing out of the fact that the deed failed to disclose two actual interests and the trustee was only entitled to one-half of the surplus.

In Re McConnell, 28 Am. Bank Rep. 659.

The case of In Re McIntosh, decided by the Circuit Court of Appeals, 9th Circuit, is no different in principle than the case at bar. In that case one Costigan on May 11, 1903, borrowed from a bank $9,000.00 and as security executed deeds to certain property in the form of absolute conveyances. These deeds were not placed on record. On the 16th day of September, 1904, Costigan filed a petition in bankruptcy and was adjudicated a bankrupt on the 19th day of September, following. On the 21st day of September, 1904, three days after Costigan was adjudicated a bankrupt, the deeds previously executed By Costigan were filed for record. It was claimed that the failure to place the deeds on record operated as a fraud upon the creditors of Costigan, who gave credit to him subsequently to the execution of the deeds and prior to the recording of the same. In disposing of the case the court said:

> "In the bill under consideration there is not even an averment of an agreement on the part of the defendants to withhold from record the deeds in question, much less any direct averment that the deeds were withheld from the record by the agreement of the parties for the fraudulent purpose of giving to the bankrupt a false credit, or that the grantee concealed the fact that such deeds were made with fraudulent intent to deceive and defraud the creditors of the grantor. We agree with the district judge that it is not sufficient to simply allege probative facts from which it may be argued that there was such agree-

ment or active concealment. Rogers v. Page, supra, and cases there cited. See, also, Blennerhasset v. Sherman, 105 U. S. 118, 26 L. Ed. 1080; Curry v. McCauley (C. C.), 20 Fed. 583; Smith v. Craft (C. C.), 17 Fed. 705; Stephens v. Sherman, Fed. Cas. No. 13,369-A."

In Re McIntosh, 150 Fed. 546.

In the course of its opinion in the last cited case the court refers to the case of Rogers vs. Page, 140 Fed. 596, and cites with approval the following extraction from that case:

"There is a distinction between a mere negligent failure to record a mortgage or deed, and a deliberate agreement to do so, although the mere fact of an agreement to withhold from record is not of itself such evidence of a fraudulent purpose as to constitute a fraud in law. It is, however, a circumstance constituting more or less cogent evidence of a want of good faith according to the particular situation of the parties, and the intent as indicated by all of the facts and circumstances of the particular case."

Rogers vs. Page 140 Fed. 596.

INSUFFICIENCY OF THE PROOF.

Viewed as a suit to set aside the conveyance as fraudulent there is an entire lack of proof to justify a decree for petitioner. The evidence as to the trust capacity in which the property was held by the bankrupt stands absolutely unquestioned. In the case of Tarsney vs. Turner the U. S. Circuit Court for the Eastern District of Michigan was confronted with a similar situation. In that case one Henry Turner, between 1873 and '77 acquired title to property real and personal of a value of $50,000.00. Between the 13th day of March and the 13th day of December, 1877, he conveyed by several instruments, all of his property to his wife, reciting an aggregate consideration of $58,365.00. In the following year he filed a petition in bankruptcy, and in due course the plaintiff in the case, Tarsney, was appointed assignee of his estate. His assets being insufficient to pay the debts, a bill was filed by the assignee for the purpose of having the conveyances to his wife annuled on the ground that they were executed without consideration and with intent to hinder, delay and defraud creditors. There was no positive evidence of any actual fraudulent intent in the execution of the conveyances and on the ground of insufficiency of proof the bill was dismissed.

In the course of its opinion the court said:

> "There is no positive evidence of an actual fraudulent intent in the execution of these con-

veyances or either of them, but it is insisted that they are badges from which the fraudulent intent ought to be inferred. A badge of fraud is in fact calculated to throw suspicion upon the particular transaction. But badges of fraud are not conclusive, they may be explained. Has such explanation been made in this case? In this regard no proof has been offered, except the evidence of the defendant and her husband. * * * They say the defendant owned a separate property in China which yielded an annual rent of $5,000.00 which by her direction was paid to her husband; that he used this fund to him to pay for the property (or a portion of it), in controversy, and took the title in his own name; that in this way he became her debtor and that he honestly and in good faith made the conveyances assailed by this proceeding in liquidation of his said indebtedness."

The court then pointed out that there was no other evidence in the case showing the fact to be otherwise and therefore held that the complainant was not entitled to a decree on the ground that the conveyances mentioned were made to hinder, delay and defraud creditors.

Tarsney vs. Turner, 48 Fed. 818.

Viewed as a proceeding based on the doctrine of estoppel to subject the property in question to liability for the indebtedness of the First National Bank under the allegations of the petition that credit was extended

by the bank in reliance on the representation of the bankrupt that he was the owner of the property, the petition is wholly insufficient to warrant the granting of equitable relief.

Breeze vs. Brook, 31 Pac. 742;
Murphy vs. Clayton, 45 Pac. 267;
Richmond vs. Blake, 60 Pac. 385;
Brant vs. Virginia Coal Co., 93 U. S. 327;
Trenton Banking Co. vs. Dunton, 86 N. Y. 230.

It is not alleged that reliance was placed on the records, but only on the representations of the bankrupt and under such circumstances no recovery could be allowed according to the authorities above cited.

It is difficult to perceive what principle of law or equity could be invoked to divest the true owner of his title for the benefit of the creditors herein. As heretofore stated they have acquired no liens by judgment, attachment or otherwise and are in no manner brought into privity to the title. They are strangers to the transaction between the bankrupt and the defendant. It may be said that credit was extended by the First National Bank in reliance on the record title, but this is not enough. The recording laws are not for the benefit or protection of creditors, but are established for the protection of purchasers and encumbrancers of real property, dealing directly with the property. There is no low prohibiting a man from carrying his property in the name of another under a parol trust. The recording laws, however,

would protect any purchaser or encumbrancer acquiring title from the apparent owner in reliance on the record title. In such a case the purchaser is brought into privity to the title and by the doctrine of estoppel, the true owner would be estopped from asserting his title. But a mere creditor occupies no such position. There is no privity of relation whatever between the creditor and the true owner. There was no duty owing and no obligation upon the part of the true owner toward the creditor. Having taken no mortgage and having acquired no lien by attachment or otherwise while the title stood in the name of the bankrupt, there is no principle of law or equity upon which the true owner can now be divested of his title.

As said by the Supreme Court of California:

> "There is nothing illegal or against public policy in the mere fact that a party equitably entitled to real property permits the legal title to remain in another. Resulting trusts are fully recognized by our law and everyone is presumed to know the law."
>
> Murphy vs. Clayton, 45 Pac. 266-269.

There being nothing illegal or wrongful in a citizen equitably entitled to real property allowing his property to stand in the name of another, how then can a creditor claim any rights against such a citizen in the absence of any active fraud or misconduct.

In Murphy vs. Clayton, the court says:

"To constitute such an estoppel it must be shown that the person sought to be estopped has made an admission or done an act with the intent of influencing the conduct of another or that he had reason to believe would influence his conduct, inconsistent with the evidence he proposes to give or the title he proposes to set up; that the other party has acted upon or been influenced by such conduct or declaration; that the party so influenced would be prejudiced by allowing the truth of the admission to be disproved. Equity does not favor estoppels, and I see no reason why this case should not be determined according to the verity of the fact. Perry, Trusts, Sec. 416."

"In Lord v. Bishop, 101 Ind. 334, where a husband received money from his wife's mother to be invested in lands for the wife, and took title in his own name, and held it 33 years, and then, when in debt, put the title in his wife, having during that time paid the taxes, and by his labor cleared and improved the land, it was held that equity would not subject it to the payment of his debts. The court said: 'Taking the title in his own name made the husband as much her trustee as though he had received the money directly from his wife's hand. It was not for the husband to take to himself the benefaction which the mother intended to bestow upon her daughter, and his creditors can stand in no better attitude than he stood himself. Bank v. Kimble, 75 Ind. 195, Perry, Trusts, Sec. 127. 'That the husband spent his time and labor in clearing and improving the land, and that he

paid the taxes, does not alter the case. The fact remains that it was his wife's land, and he could not improve it away from her.' It is true that in that case the husband took the title in his own name without his wife's knoweldge or consent; but that fact does not seem to have been considered important. The wife had had ample time to ascertain the fact, and to have the legal title transferred to herself."

Murphy vs. Clayton, Supra.

THE RECORDING LAWS.

There is nothing in the recording laws of the State of Idaho indicating a purpose to aid or protect creditors in determining the credit rating of citizens. These laws were enacted with no such end in view, but for the purpose only of protecting bona fide purchasers and encumbrancers in good faith.

Sec. 3149, Idaho Revised Codes provides as follows:

"Any instrument or judgment affecting the title to or possession of real property may be recorded under this chapter."

Sec. 3159, Idaho Revised Codes provides as follows:

"Every conveyance of real property, acknowledged or proved, and certified, and recorded as prescribed by law, from the time it is filed with the recorder for record, is constructive notice of the contents thereof to subsequent purchasers and mortgagees."

Sec. 3160, Idaho Revised Codes provides as follows:

> "Every conveyance of real property other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded."

None of these provisions of the Idaho Codes indicate a purpose of protecting or safeguarding creditors who have acquired no right, title or lien on the property.

In the chapter following, however, the legislature of Idaho under the title of "Unlawful Transfers" set out to look after the rights and interests of creditors and it provides in this respect as follows:

Sec. 3169:

> "Every transfer of property, or charge thereon made, every obligation incurred, and every judicial proceeding taken with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor."

This section has no application, for the reason as we have already pointed out, that the conveyances by the bankrupt was merely in performance of a parol trust and there is no proof of actual fraud.

But the Idaho Legislature did not stop here, it has placed on the statute books of the state a law which covers precisely the situation now before the court.

Sec. 3114, Rev. Codes of Idaho, provides as follows:

> "Every grant or conveyance of an estate in real property is conclusive against the grantor, also against every one subsequently claiming under him, except a purchaser or incumbrancer, who in good faith, and for a valuable consideration, acquires a title or lien by an instrument that is first duly recorded."

Under this statute it would be necessary for the creditor to establish a lien upon the property prior to the reconveyance to the true owner. A similar statutory provision exists in California and was considered in the case of Murphy vs. Clayton, Supra. For a discussion of the purpose and object of the laws relating to the recording of instruments, See Vol. 2 Jones on Real Property in Conveyancing, Sec. 1368, et seq. It is there clearly pointed out that the object of the recordation laws is to protect the title of purchasers of real property and not to create an agency for assistance of banks or business firms in fixing credit ratings.

The danger of establishing any such rule is manifest in this case. At the time of filing of petition herein and before the hearing, only one creditor, the First National Bank, complained of the transfer now

sought to be avoided, and according to the allegations of the trustee it relied only on the representations of the bankrupt. No reference whatever was made to the record title. At the hearing some witnesses in an indirect way attempted to claim that they relied on the record title. When their testimony is analyzed, however, it will be found that none of them claim directly that they relied on the condition of the records showing the title standing in the name of the bankrupt.

To permit the true owner to be divested of title upon parol proof of this character would have a greater tendency to permit fraud than to prevent it. None of the witnesses testifying at the hearing had the courage to come out plainly and clearly and swear that they relied upon the title as it stood upon the records, but their testimony is clouded by indirect statements and insinuations, and it cannot be said from the testimony of any of these witnesses that they did as a matter of fact actually rely upon the record title to this property standing on the records in the name of the bankrupt. The evidence lacks the clear and convincing force requisite to set the machinery of a court of equity in motion.

We respectfully submit that the conveyance sought to be avoided was not made for the purpose of defrauding, hindering or delaying the creditors herein; that the testimony absolutely fails to show any fraudulent intent or active wrong on the part of defendant; that there is no basis for the application of the equit-

able doctrine of estoppel and that upon all the evidence the decision and decree herein should be reversed and this suit ordered dismissed.

Respectfully submitted,

J. BRUCE KREMER,
JAMES E. MURRAY,
Solicitors for Appellant.